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BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE

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IN RE: PROCEEDING FOR THE PURPOSE OF ADDRESSING COMPETITIVE EFFECTS  
OF CONTRACT SERVICE ARRANGEMENTS FILED BY BELLSOUTH  
TELECOMMUNICATIONS, INC. IN TENNESSEE

DOCKET NO. 98-00559

**Responses of SECCA, NEXTLINK, and e.spire to  
BellSouth's Motion to Compel**

BellSouth Telecommunications, Inc. ("BellSouth") has moved to compel answers to discovery requests submitted in this proceeding. BellSouth's arguments largely mirror the company's earlier, unsuccessful effort to expand this proceeding, which is designed to address the "competitive effects of contract services arrangements filed by BellSouth," into an investigation of the activities of competitive, local exchange carriers ("CLECs"). The Authority has repeatedly rejected BellSouth's arguments. Attached is a copy of an earlier filing by the intervenors explaining why BellSouth's proposal is inconsistent with the purpose of this investigation. In sum, BellSouth has market power. CLECs do not. Therefore, BellSouth's CSAs can have harmful "competitive effects." The action of CLECs cannot.

BellSouth's Motion also raises other arguments which merit a short response:

1. The intervenors do not at this time have a position as to whether or not a particular BellSouth CSA is anticompetitive. BellSouth argues that, if the intervenors have no position, "why are they participating in this docket?" Motion at 3.

The intervenors, however, are not required to take a position on this or any other issue in order to intervene and participate as a party. The Tennessee Uniform Administrative Procedures Act ("UAPA") requires only that an intervenor demonstrate that his "legal interest may be determined" in an agency proceeding. T.C.A. § 4-5-310.

This proceeding was initiated by the TRA, not the intervenors, and it is not the responsibility of the intervenors to identify the reasons of the TRA's decision to open this investigation.

If and when the intervenors decide to present evidence or legal arguments to the TRA on BellSouth's CSAs, the intervenors will do so through pre-filed testimony or legal briefs and BellSouth will presumably have ample time to respond.

2. BellSouth contends that the CSAs offered by CLECs are relevant to an investigation of the "competitive effect" of BellSouth's own contracts. The company also quotes remarks from Director Greer asking to see CLEC contracts.

Under the agency's rules, the TRA may at any time request copies of special contracts entered into by CLECs. *See* TRA Rule 1220-4-8-.07(3). But those contracts have no relevance to this proceeding because, as discussed earlier, BellSouth has the ability to impair competition. CLECs, as a matter of law, do not.<sup>1</sup>

3. BellSouth demands that the intervenors demonstrate whether they have been harmed by any particular CSA. Here again, BellSouth is trying to divert the TRA's attention to irrelevant issues.

The purpose of this proceeding is to investigate the "competitive effects" of contract service arrangements filed by BellSouth Telecommunications, Inc. in Tennessee. It is not to investigate the status of competition generally in Tennessee or to examine the plans and practices of carriers other than BellSouth. In determining whether a BellSouth CSA violates state regulatory laws, the only relevant issues concern BellSouth itself: the terms of BellSouth's CSAs, the

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<sup>1</sup> A company must first have "market power" to be guilty of anti-competitive conduct under the antitrust laws. *Brown Shoe v. U.S.*, 370 U.S. 294, 322 (1962).

circumstances of the negotiations, and whether BellSouth's CSAs reflect a larger strategy to thwart competition. It is irrelevant whether a CLEC has also tried, or may someday in the future try, to serve that same customer. For example, if a particular CSA is priced below cost, or contains punitive termination sanctions, that CSA may be "anticompetitive" or "discriminatory," in violation of state regulatory laws. In making that decision, it makes no difference whether a CLEC could also serve that same customer.

Having tried and failed to transform this investigation of BellSouth's CSAs into an investigation of the customer-specific contracts of CLECs, BellSouth is now trying to turn this proceeding into an antitrust suit with BellSouth as the defendant and the intervenors playing the role of plaintiffs.

In an antitrust proceeding, the plaintiffs would have to prove that they have been damaged by the plaintiff's illegal conduct. But this is a investigation launched by the TRA, not an antitrust complaint filed by the intervenors; and the issue here is whether BellSouth's CSAs violate state regulatory statutes, not whether the intervenors have suffered or may suffer in the future as a result of Bell's conduct.

Therefore, BellSouth's questions about the status of competition in Tennessee and the impact of BellSouth's CSAs on competitors are irrelevant to this proceeding.


4. In regard to the Southeastern Competitive Carriers Association ("SECCA"), BellSouth argues that SECCA must answer discovery requests on behalf of each SECCA member. BellSouth cites no legal authority for this unusual demand.

Trade associations, such as the U.S. Telephone Association or the Tennessee Telephone Association, typically intervene and participate in state and federal regulatory proceedings. In

such a case, the association itself is a party and, as such, has a position which may or may not reflect the position of each individual member of the association. While BellSouth may properly take discovery of any party to this case, the association's members are not parties to this proceeding, except as they may have individually chosen to intervene. BellSouth may not, therefore, demand answers from individual SECCA members who are not otherwise parties to this proceeding.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

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## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been hand delivered or mailed to the following persons on this the 16th day of February, 1999.

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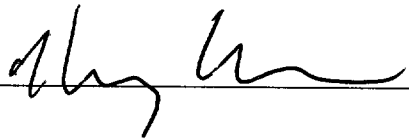
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**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

THE  
EXECUTIVE SECRETARY

**NASHVILLE, TENNESSEE**

**IN RE: Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc. in Tennessee**

**Docket No. 98-00559**

**RESPONSE OF NEXTLINK, SECCA, AND e.spire TO BELL SOUTH'S MOTION TO EXPAND SCOPE OF PROCEEDINGS**

The above-captioned matter was opened by the Tennessee Regulatory Authority ("TRA" or "Authority") to investigate the "Competitive Effects of Contract Service Arrangements filed by BellSouth Telecommunications, Inc., ("BellSouth" or "Bell") in Tennessee. BellSouth now asks the TRA to transform this proceeding from an investigation of possibly anticompetitive conduct by BellSouth into a generic rulemaking. BellSouth earlier made the same request to Hearing Officer Richard Collier who, after hearing argument, denied Bell's motion.

NEXTLINK Tennessee, L.L.C., the Southeastern Competitive Carriers Association (SECCA), and e.spire oppose Bell's motion.

I. As stated in the caption, the purpose of this proceeding is to investigate the "competitive effects" of BellSouth's contracts. The reason for focusing on BellSouth is self-evident: BellSouth dominates the local exchange market within the company's service territory. Only Bell has

“market power” in those areas. Only Bell has sufficient market control to engage in anticompetitive conduct. See Brown Shoe v. U.S., 370 US 294, 322 (1962) (recognizing the importance of market power in assessing the anticompetitive effect of proposed conduct). In sum, Bell’s actions can have “competitive effects.” The actions of CLECs cannot.

For that reason, Tennessee’s regulatory statutes and the TRA’s rules treat incumbent carriers like BellSouth differently than CLECs.<sup>1</sup> BellSouth’s rates are regulated, either through traditional, rate base regulation or through a “price regulation” plan. T.C.A. § 65-5-209. BellSouth must also “adhere to a price floor for competitive services.” T.C.A. § 65-5-208(c). These requirements do not apply to CLECs. To prevent incumbent carriers from engaging in anticompetitive practices, the TRA’s rules also impose unique obligations on BellSouth and other incumbent carriers regarding the filing of tariffs, cost-support data, and financial reports. In regard to customer-specific contracts (“CSAs”), Bell must obtain TRA approval for each CSA and cannot offer service at less than cost. CLECs, on the other hand, may offer service at any price. The reason for these differences is that BellSouth has market power. CLECs do not.

Trying to deflect the Authority’s attention from the competitive effect of BellSouth’s conduct, the company raises other issues, such as the meaning of the term “similarly situated” customers, and argues that this should be a matter of industry-wide concern.

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<sup>1</sup> In announcing the TRA’s decision in docket 97-07505, Application of BellSouth BSE, chairman Malone noted, “As the dominant local carrier in Tennessee and as a BOC under federal law, BST is legally subject to a greater and far more distinct level of scrutiny in this state,” Transcript of TRA public meeting, Sept. 15, 1998.

But Bell's argument would change the nature and purpose of this investigation. Under state law, all utilities must offer non-discriminatory service. See T.C.A. § 65-5-110. Based on Bell's logic, the TRA should expand this docket to include every utility in Tennessee and turn this case into a generic rulemaking.

This is not a rulemaking to define terms like "similarly situated." This is a contested case proceeding opened for the purpose of investigating the "competitive effect" of BellSouth's customer-specific contracts. That is how it should remain. It would be a pointless exercise to consider the "competitive effect" of the actions of CLECs which, by definition, lack sufficient market power to engage in anticompetitive conduct.

II. The Federal Communications Commission ("FCC") will soon have before it BellSouth's 271 application to offer in-region, interLATA service. In considering such applications, the FCC has invited state regulatory commissions to submit "evidence that a BOC applicant has engaged in discriminatory or other anticompetitive conduct." The agency said, "We encourage interested parties, including the relevant state commissions, to identify other factors that we might consider in the context of a specific application in making this assessment." *Application of Ameritech Michigan Pursuant to Section 271*, cc docket 97-137, paragraphs 397 and 398, issued August 14, 1997. See also transcript of TRA 271 hearing, vol. IIIA, p. 25.

The "competitive effect" of BellSouth's CSAs is precisely the kind of evidence that the FCC has invited state commissions to submit in order for the FCC to evaluate BellSouth's 271 application. This docket will enable the TRA to gather and analyze evidence showing whether




BellSouth is using CSAs to engage in anticompetitive conduct. Turning this case into an industry-wide rulemaking, as Bell proposes, will only make that task more difficult.

### CONCLUSION

The purpose of this docket is not to make rules but to gather information about whether BellSouth is engaging in anticompetitive conduct. BellSouth's motion is only intended to deflect the agency from its purpose. The motion should be denied.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Henry Walker", is written over a horizontal line.

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## CERTIFICATE OF SERVICE

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